Tan Tien Seng & Anor v Grobina Resorts Sdn Bhd

HIGH COURT (MELAKA) — ORIGINATING SUMMONS NO 24–537 OF 2000
LOW HOP BING J
14 JULY 2005

Contract — Breach — Fundamental breach — Contract for sale of highest floor of building to purchaser — Whether term with regard to highest floor of building essential term and of major importance — Whether amounted to fundamental breach

Land Law — Housing developers — Sale and purchase agreement — Construction of agreement — Deviations from original plans without consent of purchasers, whether amounted to fundamental breach of agreement

Words and Phrases — 'Appropriate authority'

The defendant was a licensed housing developer which undertook a condominium project ('the condo project') on a piece of land at Melaka Tengah. The plaintiffs purchased a unit which was to be constructed on the highest floor of the condo project. The parties agreed based on the building plan that the plaintiffs' unit would be on the highest floor, being Floor 16. However the defendant had constructed a 17th floor on the project on the basis of the defendant's own amendments to the original approved plans, which amendments were purportedly approved by the then Melaka Municipal Council. The condo project was completed with 17 floors (instead of the 16floors specifically agreed in the sales and purchase agreement with the plaintiffs ('the SPA')). The plaintiffs upon discovery of the deviations to the building design made numerous complaints to the defendant and subsequently decided to terminate the SPA, claiming breach of the SPA and prayed for refund of the purchase price and other expenses thereto. According to the plaintiffs: (1) the developer had a strict obligation to comply with the contractual provisions which must be given full force — cl 12 of the SPA prohibits deviations from the original plans without the written consent of the purchasers except such as may be required by the Appropriate Authority; and (2) the 'Appropriate Authority' as defined in cl 31(b) did not include the architect or structural engineer employed by the defendant.

Held, allowing the plaintiffs' claim:

(1) The rights and obligations of the parties were to be determined by reference to the SPA which was to be construed together with the provisions of the housing legislation (see para 24). According to cl 12, it was only with the consent in writing of the plaintiffs as purchasers that the defendant as developer was permitted to make changes to or deviations from: (1) the description set out in the First and Fourth Schedules of the SPA, and (2) the plans approved by the Appropriate

Authority (see para 27). Exceptionally, such changes and deviations may be made by the defendant if they were such as may be required by the Appropriate Authority (see para 28).

(2) The architect or structural engineer employed by the defendant could not come within the scope of cl 31(b) (see para 30). In so far as the words 'such as may be required by the Appropriate Authority' in cl 12 were concerned, the changes to or deviations from the building plan would have come within the ambit and purview of cl 12 if such changes or deviations had been required, ie unilaterally imposed by the appropriate authority but not otherwise, as in the instant case the defendant had of its own volition added on the 17th floor and then seeking approval from the appropriate authority. Such conduct of the defendant clearly ran counter to the second limb of cl 12 (see para 31). Although the burden of proof was on the defendant to establish that the 'Appropriate Authority' had required the construction of the 17th floor, the defendant had adduced no evidence that the 17th floor had been required by the 'Appropriate Authority' (see para 36). Further, the defendant's failure to call any of the officers from the Appropriate Authority as witnesses to testify that the construction of the 17th floor was required by the Appropriate Authority amounted to adverse inference under 114(g) of the Evidence Act 1950 (see paras 37 and 38).

(3) There could be no doubt that at the time the SPA was entered into, the intention of the parties had always been the sale and purchase of the unit on the highest floor and that there should be no other floor above it as expressly provided for in the First and Fourth Schedules (see para 42). The defendant's failure or inability in delivering the unit on the highest floor of the condo project was a breach going to the root of the contract and constituted a fundamental breach (see para 44).

[**Bahasa Malaysia summary**

Defendan adalah pemaju perumahan berlesen yang telah menjalankan satu projek kondominium ('projek kondo tersebut') di atas sebidang tanah diMelaka Tengah. Plaintif telah membeli satu unit yang akan dibina pada tingkat paling tinggi projek kondo tersebut. Pihak-pihak telah bersetuju berdasarkan plan bangunan bahawa unit plaintif akan berada pada tingkat paling tinggi, iaitu Tingkat 16. Walau bagaimanapun, defendan telah membina tingkat ke-17 dalam projek tersebut berdasarkan pindaan defendan sendiri terhadap plan asal yang telah diluluskan, yang mana pindaannya kononnya telah diluluskan oleh Majlis Perbandaran Melaka. Projek kondo tersebut telah disiapkan dengan 17 tingkat (bukannya 16 tingkat seperti yang telah dipersetujui dalam perjanjian jual beli dengan plaintif ('SPA tersebut')). Plaintif, setelah mengetahui perubahan kepada rekabentuk bangunan tersebut, telah membuat pelbagai

aduan kepada defendan dan kemudiannya telah memutuskan untuk membatalkan SPA tersebut, dengan mendakwa perlanggaran terhadap SPA dan memohon pemulangan semula harga belian dan lain-lain perbelanjaan yang berkaitan dengannya. Menurut plaintif: (1) pemaju mempunyai tanggungjawab yang ketat untuk mematuhi peruntukan kontraktual yang perlu dikuatkuasakan sepenuhnya — klausa 12 SPA tersebut melarang perubahan kepada plan asal tanpa kebenaran bertulis daripada pembeli kecuali apabila dikehendaki oleh pihak berkuasa yang berkenaan; dan (2) pihak berkuasa yang berkenaan seperti yang ditafsirkan dalam klausa 31(b) tidak termasuk arkitek atau jurutera struktur yang diupah oleh defendan.

Diputuskan, membenarkan tuntutan plaintif:

(1) Hak-hak dan tanggungjawab pihak-pihak adalah ditentukan dengan merujuk kepada SPA tersebut yang perlu ditafsirkan bersama dengan peruntukan undang-undang perumahan (lihat perenggan 24). Menurut klausa 12, hanya dengan kebenaran bertulis oleh plaintif sebagai pembeli pemaju dibenarkan untuk membuat perubahan atau kelainan kepada: (1) penerangan yang terkandung dalam Jadual Pertama dan Keempat SPA tersebut, dan (2) plan yang telah diluluskan oleh pihak berkuasa yang berkenaan (lihat perenggan 27). Dengan pengecualian, perubahan atau kelainan boleh dibuat oleh defendan sekiranya ianya dikehendaki oleh pihak berkuasa yang berkenaan (lihat perenggan 28).

(2) Arkitek atau jurutera struktur yang diupah oleh defendan tidak termasuk dalam skop klausa 31(b) (lihat perenggan 30). Berkenaan dengan perkataan-perkataan 'such as may be required by the Appropriate Authority' dalam klausa 12, perubahan atau kelainan kepada plan bangunan adalah termasuk dalam klausa 12 sekiranya perubahan atau kelainan tersebut dikehendaki, iaitu dikenakan secara sebelah pihak oleh pihak berkuasa yang berkenaan dan bukannya sebaliknya, sepertimana dalam kes ini, defendan atas kerelaannya sendiri menambah tingkat 17 dan kemudiannya memohon kebenaran daripada pihak berkuasa yang berkenaan. Kelakuan defendan adalah bertentangan dengan cabang kedua klausa 12 (lihat perenggan 31). Walaupun beban pembuktian adalah atas defendan untuk mewujudkan bahawa 'pihak berkuasa yang berkenaan' telah mengarahkan pembinaan tingkat ke-17, defendan tidak mengemukakan sebarang bukti bahawa pembinaan tingkat ke-17 diperlukan oleh pihak berkuasa yang berkenaan. Tambahan pula, kegagalan defendan untuk memanggil pegawai daripada pihak berkuasa yang berkenaan sebagai saksi untuk memberi keterangan bahawa pembinaan tingkat ke-17 adalah diminta oleh pihak berkuasa tersebut, adalah terjumlah kepada andaian bertentangan di bawah s 114(g) Akta Keterangan 1950 (lihat perenggan 37 dan 38).

(3) Tiada keraguan bahawa semasa SPA tersebut ditandatangani, niat pihak-pihak sememangnya adalah untuk jualan dan belian unit pada tingkat tertinggi dan bahawa tidak ada tingkat lain di atasnya seperti yang diperuntukkan dengan nyata dalam Jadual Pertama dan Keempat (lihat perenggan 42). Kegagalan atau ketidakupayaan defendan untuk menyiapkan unit tingkat tertinggi projek kondo tersebut merupakan perlanggaran kontrak dan membentuk satu perlanggaran utama (lihat perenggan 44).]

Notes

For cases on fundamental breach of contract, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2310–2314.

For cases on sales and purchase agreement, see 8(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2624–2630.

Cases referred to

Associated Newspapers Ltd v Bancks [1951] 83 CLR 322 (refd)
Ayles v Cox [1905] ER 684 (refd)
Bentsen v Taylor, Sons & Co (No 2) [1893] 2 QB 274 (refd)
Chan Yoke Lain (administrator of the estate of Chong Yoke Fah, deceased) v Pacific & Orient Insurance Co Sdn Bhd [1999] 1 MLJ 303 (refd)
Datin Peggy Taylor v Udachin Development Sdn Bhd [1984] 1 MLJ 85 (refd)
Davidson v Qwynne (1810) 12 East 381 (refd)
Decro-Wall International SA v Practioners in Marketing Ltd [1971] 2 All ER 216 (refd)
Edyvane v Donnelly & Ors [1946] NZLR 263 (refd)
Hong Kong Fir Shipping Co Ltd v Kawasaki Kaisen Kaisha Ltd [1962] 2 QB 26 (refd)
Hwa Chea Lin & *Anor v Malim Jaya (Melaka) Sdn Bhd* [1996] 4 MLJ 544 (refd)
James Joseph Silva v Tarval Pty Ltd [1990] NSW Lexis 10517 (refd)
Khau Daw Yau v Kin Nam Realty Development Sdn Bhd [1983] 1 MLJ 335 (refd)
Lee v Rayson [1917] 1 Ch 613 (refd)
Lim Sew Lan v Pembangunan Hysham Sdn Bhd & Anor [1999] 5 MLJ 670 (refd)
SEA Housing Corp Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31 (refd)
Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd [1938] SRNSW 632 (refd)
Tribunal Tuntutan Pembeli Rumah v Westcourt Corp Sdn Bhd & other appeals [2004] 3 MLJ 17 (refd)
Wallis, Son and Wells v Pratt and Haynes [1910] 2 KB 1003 (refd)
Westcourt Corp Sdn Bhd lwn Tribunal Tuntutan Pembeli Rumah [2004] MLJU 383 (refd)

Legislation referred to

Contracts Act 1950 s 40
Evidence Act 1950 s 114(g)
Specific Relief Act 1950 s 34(1)(a)

Leong Wai Hong (Claudia Cheah with him) (Skrine) for the plaintiffs.
Hillary D'Cruz (BP Yap with him) (Bell & Lee) for the defendant.

Low Hop Bing J:

I PLAINTIFFS' CLAIM

[1] The plaintiffs' claim by way of an originating summons has been converted to a writ, in which the plaintiffs sought the following reliefs:

(a) A declaration that the defendant is in breach of the sale and purchase agreement dated 3 January 1995 executed between the plaintiffs and the defendant ('the SPA') in respect of the property known as Parcel No 16–01 of No 01–Pent 7 ('the unit') in Tanjung Samudera Kondominium Beach Resort ('the condo project');

(b) A declaration that the plaintiffs have effectively rescinded the SPA in respect of the unit *ab initio*;

(c) An order for repayment by the defendant of:

(i) RM844,443 being the purchase price of the unit;

(ii) RM8,800.62 being the sum of all deposits, charges and property tax paid by the plaintiffs in respect of the unit; and

(iii) S$650 being the legal fees paid by the plaintiffs in respect of the SPA for the unit;

(d) General damages;

(e) Interest on all sums payable by the defendant at the rate of 8% pa from 7 March 2000 until realisation;

(f) Costs;

(g) A declaration that the plaintiffs are entitled to a lien on the unit for the said purchase price, damages, interest and costs recovered by the plaintiffs in this action; and

(h) Further declarations and orders as this court thinks fit and fair.

II FINDING OF FACTS

[2] After a full trial, the narrative of my finding of facts may be unfolded as follows:

[3] The plaintiffs are individuals and citizens of Singapore and the defendant is a licensed housing developer which undertook the condo project on the land held under Registration No 179, Lot No 2170, in the mukim of Tanjung Kling, in the district of Melaka Tengah, in the state of Melaka.

[4] In 1994, the defendant obtained a developer's licence and advertising permit for the purpose of launching the condo project. When the plaintiffs attended the ground-breaking ceremony of the condo project in December 1994, the first plaintiff PW1 was approached by one Francis Cho, the defendant's operation manager, whose scope of duty included the marketing and running of the Condo Project, and sourcing finance and handling house buyers for the defendant.

[5] The first plaintiff had informed Francis Cho that he (the plaintiff) was interested in purchasing the unit which was to be constructed on the highest floor of the condo project. The parties herein had no doubt whatsoever that the building plan provided for a total of 16 floors for the condo project.

[6] Clause 12 of the SPA expressly provides as follows:

> The said Parcel together with all the common property shall be constructed in a good and workmanlike manner in accordance with the description set out in the Fourth Schedule hereto and in accordance with the plans approved by the Appropriate Authority which description and plans have been accepted and approved by the Purchaser, as the Purchaser hereby acknowledges. *No changes thereto or deviations therefrom, shall be made without the consent in writing of the Purchaser except such as may be required by the Appropriate Authority* ...' (Emphasis added.)

[7] The First and Fourth Schedules to the SPA also expressly provide for the maximum of 16 floors for the condo project, and there is no provision in the SPA for the construction of the 17th floor.

[8] A reference hereinafter to a clause and a schedule is a reference to that clause and schedule respectively in the SPA unless the context otherwise requires.

[9] The defendant had not called the defendant's civil and structural engineer Jurureka Konsult and the chartered architect AAP as expert witnesses to testify to the relocation of the water tank, allegedly due to the structural difficulty and other highly technical and scientific matters arising out of and in connection with the condo project, which had resulted in the construction of the 17th floor. DW1 however purported to give evidence as an expert.

[10] DW1 further testified that the defendant had constructed the 17th floor on the basis of the defendant's own amendments to the original approved plans, which amendments were purportedly approved by the then Melaka Municipal Council on 12 May 1997.

[11] On 17 January 1998, the condo project which then had 17 floors (instead of the 16 floors specifically agreed in the SPA) was completed and the architect's certificate of practical completion was issued.

[12] The defendant sent a letter dated 17 January 1998 to the plaintiffs informing them that vacant possession of the unit was ready to be delivered

to the plaintiffs. The letter also requested the plaintiffs to make the necessary payments as stipulated in the SPA and indicated that under clause 23, the plaintiffs were deemed to have taken delivery of vacant possession of the unit after a lapse of 14 days from the date thereof.

[13] On or about March 1998, the plaintiffs inspected the unit and discovered that there were deviations to the building design which had been made by the defendant without the plaintiffs' consent in writing. The deviations concerned the Storey Plan in the First Schedule as the unit purportedly delivered with vacant possession to the plaintiffs was not on the highest storey as there existed and still exists an additional 17th floor above the unit, as a result of which the plaintiffs had made numerous complaints to the defendant.

[14] The first plaintiff had vide letter dated 29 January 1999 to the defendant stated, *inter alia*, that the unit had not been constructed in accordance with the plans and descriptions as specified in the First and Fourth Schedules, and had asked the defendant to rectify in accordance with clauses 12 and 26 which the defendant had vide letters dated 10 February 1999 and 17 February 1999 vehemently refused, failed or neglected to do.

[15] Vide letter dated 24 March 1999 which was followed by the letter dated 2 May 2000 issued by the plaintiffs' solicitors to the defendant, the plaintiffs decided to terminate the SPA and to seek the reliefs alluded to above, on the ground that the defendant had failed to build according to the original building plan and that amendments were made to the building design without the plaintiffs' consent in writing in that the defendant had actually constructed an additional floor, ie 17th floor over and above the unit purchased by the plaintiffs on the 16th floor which the parties have expressly agreed as the highest floor in the SPA.

III DW1'S EVIDENCE ON TECHNICAL AND SCIENTIFIC MATTERS

[16] DWl's evidence on technical and scientific matters had been given purportedly as an expert witness as alluded to above. DW1 has no technical and scientific qualification nor any practical experience in relation to these matters, particularly the alleged structural difficulty encountered in the construction of the condo project. With the utmost respect to DW1, I am constrained to say that I am unable to accept his evidence in this respect as it is a subject matter within the domain of expert witnesses. It clearly concerns a matter of science under s 45 of the Evidence Act 1950 which where relevant reads as follows:

> 45 Opinions of Third Persons When Relevant
>
> (1) When the court has to form an opinion upon a point … of science …, …, the opinions upon that point of persons specially skilled in that … science …, are relevant facts.
>
> (2) Such persons are called experts.

A IV INTERPRETATION OF HOUSING LEGISLATION

[17] Learned counsel Mr Leong Wai Hong, assisted by Miss Claudia Cheah, submitted for the plaintiffs that the defendant being a licensed housing developer is bound by the Housing Development (Control and Licensing) Act 1966 ('the Act') as amended and the Housing Development (Control and Licensing) Regulations 1989 ('the Regulations') (both collectively referred to as 'the housing legislation') which is intended to accord protection to housing purchasers.

[18] Defendant's learned counsel Mr Hillary D'Cruz, Mr BP Yap with him, contended that the plaintiffs' submission is out of context and irrelevant.

[19] In my judgment, the facts of the case would call for the application and interpretation of the housing legislation. It is trite law that the housing legislation is principally aimed at protecting the interest of purchasers: see *Malaysian Law on Housing Developers* (2nd Ed, 2002) by Salleh Buang pp 7 and 8; *SEA Housing Corp Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 per Suffian LP (as he then was); and *Khau Daw Yau v Kin Nam Realty Development Sdn Bhd* [1983] 1 MLJ 335 at p 341 per VC George J (later JCA).

[20] More recently, in *Tribunal Tuntutan Pembeli Rumah v Westcourt Corp Sdn Bhd & other appeals* [2004] 3 MLJ 17, the Court of Appeal through the judgment of Richard Malanjum JCA (now FCJ) had the occasion to consider the Act and enunciate the following principles:

(1) It is a settled principle of law that statutes must be read as a whole (see *Kesultanan Pahang v Sathask Realty Sdn Bhd* [1998] 2 MLJ 513);

(2) There are circumstances where the nature and purpose of a particular legislation must be considered when construing its various provisions so as not to defeat the intention of Parliament (see *Akberdin bin Hj Abdul Kader & Anor v Majlis Peguam Malaysia* [2003] 1 MLJ 1; *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31); and

(3) The Act is a piece of social legislation and hence its provisions should be given liberal and purposive interpretation ie to promote the general legislative purpose underlying the provisions. (See also s 17A of the Interpretation Acts 1948 and 1967).

[21] On further appeal, *sub nom Westcourt Corp Sdn Bhd lwn Tribunal Tuntutan Pembeli Rumah* [2004] MLJU 383, the Federal Court through the judgment of Ahmad Fairuz CJ Malaysia, in affirming the decision of the Court of Appeal that the Homebuyers Claim Tribunal has jurisdiction to hear and adjudicate on cases where the sale and purchase agreement was entered into before 1December 2002, indirectly approved the Court of Appeal's enunciation of the above principles governing the interpretation of the housing legislation.

IV Discrepancies between Completed Buildings and Plans

[22] It was submitted for the defendant that:

(1) the discrepancies between the completed buildings and the plans annexed to the SPA do not constitute a breach of the housing legislation, as the SPA is a verbatim reproduction of the agreement prescribed under Schedule H to the Regulations, since the words 'required by the Appropriate Authority' in cl 12 should be construed contextually in ascribing the actual meaning, relying on *Edyvane v Donnelly & Ors* [1946] NZLR 263; and

(2) the changes and deviations are permitted and necessitated by circumstances.

[23] The response of the plaintiffs is that:

(1) the developer has a strict obligation to comply with the contractual provisions which must be given full force; and

(2) the 'Appropriate Authority' in cl 31(b) does not include the architect or structural engineer employed by the defendant.

[24] In my judgment, the rights and obligations of the parties herein are to be determined by reference to the SPA which is to be construed together with the provisions of the housing legislation.

[25] It is common ground that the unit is a housing accommodation in a subdivided building and so the SPA is governed by reg 11(1) which where relevant merits reproduction as follows:

> … where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building, it shall be in the form prescribed in Schedule H.

[26] There is no dispute that the SPA has incorporated the terms and conditions of Schedule H to the Regulations.

[27] I am of the view that a true construction of cl 12 would call for the two limbs therein to be read conjunctively. It is clear to me that it is only with the consent in writing of the plaintiffs as purchasers that the defendant as developer is permitted to make changes to or deviations from:

(1) the description set out in the First and Fourth Schedules; and

(2) the plans approved by the Appropriate Authority.

[28] Exceptionally, such changes and deviations may be made by the defendant if they are such as may be *required by the Appropriate Authority*.

[29] Clause 31(b) provides as follows:

> 'Appropriate Authority' means any authority for the time being authorised under any written law in force in West Malaysia to approve buildings plans, subdivision

of land, subdivision of building, the issue of documents of title and to enforce any other laws related thereto.

[30] In my view, the architect or structural engineer employed by the defendant could not come within the scope of cl 31(b).

[31] Further, the changes or deviations must be such as may be 'required by the Appropriate Authority', which means that the initiative for such changes or deviations must originate from such authority on grounds of eg policy considerations in relation to planning and development orders. Hence, changes and deviations which are brought about by the defendant's own amendment or making through the defendant's engineer and architect are in my view outside the scope of cl 31(b) read with cl 12.

[32] Support for my view may be found in *Ballentine's Law Dictionary* where it is stated that when used in a statute, the word 'required' may be equivalent to the word 'commandered'.

[33] The meaning of the word 'required' was considered by the Supreme Court of New Zealand in *Edyvane v Donnelly & Ors,* where Fair J concluded that it means 'mandatory'.

[34] The storey plan in the First Schedule shows that the 16th floor is the highest level of the building, but the defendant has built an additional floor, ie the 17th floor on top of the plaintiffs' unit on the 16th floor, thereby making changes to or deviations from the plans annexed to the First and Fourth Schedules. The defendant has never informed the plaintiffs nor sought the plaintiffs' consent in writing in so far as the changes or deviations were concerned.

[35] The words 'such as may be required by the Appropriate Authority' also appear in cll 7.2 and 9.1 of the SPA in *Lim Sew Lan v Pembangunan Hysham Sdn Bhd & Anor* [1999] 5 MLJ 670, which are substantially similar to cl 12 above. The developer's reliance on the protection allegedly provided under cll 7.2 and 9.1 was not sustained by Kamalanathan Ratnam J who held that the protection or exemption to those clauses take effect only when the alterations, changes or deviations to the building plans are required ie unilaterally imposed by the appropriate authority. In so far as the words 'such as may be required by the Appropriate Authority' in cl 12 are concerned, I am of the view that the changes to or deviations from the building plan would have come within the ambit and purview of cl 12 if such changes or deviations had been required ie unilaterally imposed by the appropriate authority but not otherwise, as in the instant case the defendant has of its own volition added on the 17th floor and then seeking approval from the appropriate authority. Such conduct of the defendant clearly runs counter to the second limb of cl 12.

V Section 114(g) Evidence Act 1950

[36] Although the burden of proof is on the defendant to establish that the 'Appropriate Authority' had required the construction of the 17th floor, the

defendant has adduced no evidence that the 17th floor had been required by the 'Appropriate Authority'.

[37] In my view, the defendant's failure to call any of the officers from the Appropriate Authority as witnesses to testify that changes or deviations which culminated in the construction of the 17th floor was such as was required by the Appropriate Authority would attract the application of s 114 (g) of the Evidence Act 1950 which reads:

> 114 Court may presume the existence of certain facts
>
> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> ILLUSTRATIONS
>
> The court may presume —
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) …
>
> (e) …
>
> (f) …
>
> (g) That evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;

[38] If at all the construction of the 17th floor had been such as had been required by the Appropriate Authority, the defendant would have been most enthusiastic in calling the officers from the Appropriate Authority to testify to this effect. The defendant's omission in calling these witnesses would constitute the withholding of evidence. In the circumstances I am of the view that the evidence if produced would be unfavourable to the defendant: see *Chan Yoke Lain (administrator of the estate of Chong Yoke Fah, deceased) v Pacific & Orient Insurance Co Sdn Bhd* [1999] 1 MLJ 303 per Haidar JCA (later CJ(Malaya)); and *Datin Peggy Taylor v Udachin Development Sdn Bhd* [1984] 1 MLJ 85 per Vohrah J.

VI Fundamental Breach

[39] It was contended for the defendant that the unit is neither defective nor uninhabitable and that the 17th floor only occupied a part of the roof of the unit, as a result of which the defendant had not occasioned a fundamental breach or a total failure of consideration.

[40] It was contended for the plaintiffs that there was a breach of an essential term of the contract going into the root thereof, seeking support in *Hwa Chea Lin* & *Anor v Malim Jaya (Melaka) Sdn Bhd* [1996] 4 MLJ 544; *Lim Sew Lan* and *Lee v Rayson* [1917] 1 Ch 613.

[41] In my judgment, the resolution to the above diverging submissions may be found by restating the cardinal principles which the courts have applied in order to determine whether in a particular situation there is a fundamental breach or a breach of a fundamental term, and for the purposes of this judgment, I shall use both of these expressions interchangeably.

(1) The concept of fundamental breach is common law in origin;

(2) This common law has to a great extent now found expression in statutory form in s 40 of the Contracts Act 1950 ('s 40') which reads as follows:

> When a party to a contract has refused to perform or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract unless he has signified, by words or conduct, his acquiescence in its continuance.

(See also *Hwa Chea Lin* at p 551 per Suriyadi J);

(3) The question whether or not a breach is fundamental may be found by referring to two alternatives viz the importance that the parties would seem to attach to the term which has been broken or to the seriousness of the consequences that have in fact resulted from the breach, and both these alternatives may have a part to play as the decisive element or elements: see *Cheshire, Fifoot and Furmston's Law of Contract* (2nd Ed) by Andrew Phang Boon Leong p 898;

(4) Application of the first test calls for and depends on the construction of the contract in question, at the time when it was made, the surrounding circumstances and the intention of the parties, as gathered from the instrument itself: Ibid p 898; and *Bentsen v Taylor, Sons & Co (No 2)* [1893] 2 QB 274 at p 281 per Bowen LJ;

(5) In England, in order to constitute a fundamental breach, it must be one:

(i) which 'goes to the root of the contract': Ibid p 899 referring to *Decro-Wall International SA v Practioners in Marketing Ltd* [1971] 2 All ER 216 at p 227 per Sachs LJ; *Davidson v Qwynne* (1810) 12 East 381 at p 389 per Lord Ellenborough; *Hong Kong Fir Shipping Co Ltd v Kawasaki Kaisen Kaisha Ltd* [1962] 2 QB 26 at p 64 per Ujohn LJ; or

(ii) the breach affects the very substance of the contract: *Wallis, Son and Wells v Pratt and Haynes* [1910] 2 KB 1003 at p 1012, per Fletcher Moulton LJ;

(6) Australia, on the other hand, applies the test of essentiality ie whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, the promise is of such importance to the promisee that he would not have entered into the contract unless he has been assured of a strict or substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor: Ibid, p 899 quoting Jordan CJ in *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* [1938] SRNSW 632 at p 641, and *Associated Newspapers Ltd v Bancks* (1951) 83 CLR 322 in which the High Court of Australia unanimously approved this test;

(7) In Malaysia the test of essentiality has been expounded by Visu Sinnadurai (later J) in *The Sale and Purchase of Real Property in Malaysia 1984* at pp 345 and 346 where, it was stated that a party to a sale of land may rescind the contract if the other party has breached an essential obligation of the contract for sale and that the essential obligations of a vendor include the delivery of a property as described in the contract;

(8) A breach of an essential term of the contract goes to the root of the contract and entitles the injured party to rescind and recover the payment made under the contract for failure of consideration: s 34(1)(a) of the Specific Relief Act 1950; The *Law of Restitution* by Lord Goff and Gareth Jones, 1993 p 417; *Hwa Chea Lin* per Suriyadi J; *Lim Sew Lan v Pembangunan Hysham Sdn Bhd & Anor* per Kamalanathan Ratnam J; and *Lee v Rayson.*

[42] Reverting to the facts of this case, there can be no doubt that at the time the SPA was entered into, the intention of the parties has always been the sale and purchase of the unit on the highest floor and that there should be no other floor above it as expressly provided for in the First and Fourth Schedules. This is further accentuated and confirmed by the first plaintiffs visit to the development site in early December 1994 when the condo project consisting of a maximum of 16 floors was launched, the unit in question being on the highest floor, which has led to the purchase of the unit by the plaintiffs. When the plaintiffs asked for a 10% discount, the defendant had only given 5% discount, as the plaintiffs had been informed by the defendant that the 5% discount was reasonable as the unit was on the highest floor. Had it been otherwise, the plaintiffs would not have purchased it. This has been and was within the specific knowledge of the defendant. The fact that the unit was on the highest floor as expressly stated in the SPA is clearly and undoubtedly of major importance to the plaintiffs.

[43] The unit on the highest floor of the condo project has also been clearly expressed and incorporated as an essential term in cl 30 as follows:

> The First, Second, Third and Fourth Schedules hereto shall form part of this agreement and shall be read, taken and construed as an essential part of this agreement.

[44] By way of elaboration, the First and the Fourth Schedules expressly incorporate the Storey Plan of the Condo Project and identify the unit as the highest unit on the South Wing. In my view, the defendant's failure or inability in delivering the unit on the highest floor of the condo project as a breach going to the root of the contract and constitutes a fundamental breach.

[45] It is also my specific finding that when the defendant had decided to build the 17th floor in May 1995, the defendant had chosen not to inform or notify the plaintiffs who had then paid 20% of the purchase price. Had the plaintiffs been informed of the construction of the 17th floor, the plaintiffs would have had the opportunity and option of not proceeding with the SPA. By the time the plaintiffs visited the project after January 1998, the 17th floor had already been completed and the plaintiffs were left with a *fait accompli* or Hobson's choice.

[46] There can be no doubt that there is an essential difference between the unit purchased by the plaintiffs as the unit on the highest level as expressly stated in the SPA and one that is otherwise and not what the plaintiffs had bargained for in the instant case, so that the defendant was unable to perform its promise in the SPA in its entirety, attracting the application of s 40.

[47] By way of illustration, in *Ayles v Cox* [1905] ER 684, the property was sold as *copyhold* but it turned out to be *freehold.* Sir John Romilly MR held that the vendor could not compel a specific performance because it is unnecessary for a man who has contracted to purchase one thing to explain why he refused to accept another.

[48] In *James Joseph Silva v Tarval Pty Ltd* [1990] NSW Lexis 10517, the description of the property is that of a residential flat building, which requires the 'construction of a home unit building complex'. The specifications clearly showed that all the units in the building were to be fitted out as residential premises. Kearney J of the Supreme Court of New South Wales held, *inter alia,* that this description related to home units in a wholly residential flat building and that the plaintiffs were entitled to terminate the contracts when the defendant procured the rezoning of the lower ten floors of the building, thereby rendering it impossible to complete and transfer home units described in the contracts. Where the property which the vendor offered to convey was substantially different from that which the purchaser contracted to buy, as in *Lee v Ray son,* Eve J held, *inter alia,* that the plaintiff was entitled to rescission, as a purchaser shall have that which he contracted for, or not be compelled to take that which he did not mean to have (see p 619).

[49] Within our shores, in *Hwa Chea Lin,* a developer-defendant and the purchaser-plaintiff entered into a sale and purchase agreement in respect of a single storey terrace house ('the building'). When the defendant sent a notice to the plaintiff to take delivery of the building, the plaintiff orally complained to the defendant regarding defects found in the building, for which the

defendant carried out remedial works, but in an unsatisfactory manner. Further remedial works were also carried out. Being further dissatisfied, the plaintiff through solicitors sent a letter rescinding the SPA. On the issue whether a fundamental breach existed to justify the rescission, Suriyadi J held that a fundamental breach had occurred as the building that was delivered to the plaintiffs was not what they had bargained for, being not what had been agreed upon, as a result of which the breach by the defendant was a breach that went into the root of the contract. Section 40 was also invoked.

[50] In *Lim Sew Lan v Pembangunan Hysham Sdn Bhd & Anor* the SPA provided for the purchase of one unit of shop office consisting of ground, first and second floors within six blocks of five to seven storey ground office *and service suites*. Recital C to the SPA had also confirmed this. However, the defendants constructed only three storey shop office *without service suites*. Kamalanathan Ratnam J (as he then was) in granting rescission of the SPA held that the defendants had been in breach of s 40, having gone into the very substance and root of the contract.

VII Conclusion

[51] The plaintiffs have succeeded in proving their case against the defendant based on the defendant's fundamental breach and so on the foregoing grounds, the plaintiffs are entitled to the reliefs sought in this action. I therefore give judgment in terms thereof.

Plaintiffs' claim allowed.

Reported by Loo Lai Mee